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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

OVERVIEW

This section of the Tenth Circuit Survey is comprised of a selection of the major cases decided last term dealing with criminal law and procedure. Since the Tenth Circuit decided more than fifty criminal cases during our survey period, this section is at best a sampling of cases. Thus, the reader should not expect to find treatment of every criminal case handed down by the appellate court. Likewise, the reader who expects an indepth analysis of each of the cases presented will be disappointed. Rather, this section attempts to deal with the most important and interesting cases in a way which will assist the practitioner in meaningful research in a given area of law.

The section is divided into six categories: Sixth Amendment, Fourth Amendment, Statutory Interpretation, Fifth Amendment, Post-trial Proceedings, and Trial Matters.

I. SIXTH AMENDMENT

A. *Speedy Trial*

In *United States v. Askew*,[1] the Tenth Circuit dealt with the defendant's claim that he had been deprived of his sixth amendment right to a speedy trial. The defendant was indicted in December 1974 on three counts of interstate transportation of forged securities.[2] He was tried and convicted on all counts in May, 1977, about two and a half years after the initial indictment.[3]

The trial court had granted the defendant a number of continuances based on his poor health. Further, Askew was ordered to provide the Government with handwriting exemplars in June, 1975. His refusal to do so resulted in the trial court finding him in contempt.[4] In February, 1977, the defendant moved for a dismissal of the charges, alleging that he had been deprived his right to a speedy trial. The motion was denied and the Government subsequently decided to try the case without the benefit of the requested handwriting samples.

The Tenth Circuit, citing *Barker v. Wingo*,[5] held that the defendant had not been deprived of his right to a speedy trial. Noting that the defendant had caused the greater part of the delay in bringing the case to trial, the

1. 584 F.2d 960 (10th Cir. 1978), *cert. denied*, 99 S. Ct. 1054 (1979).
2. 18 U.S.C. § 2314 (1976).
3. 584 F.2d at 961-62.
4. *Id.* at 962.
5. 407 U.S. 514 (1972). Under *Barker* the Supreme Court adopted a case-by-case approach in determining whether a defendant has been deprived of his right to a speedy trial. The Court cited four factors which are to be considered in the determination: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. *Id.* at 530. *See also* Rudstein, *The Right to a Speedy Trial*: Barker v. Wingo *in the Lower Courts*, 1975 U. ILL. L.F. 11.

court emphasized that he had produced no evidence at his trial and had made "no showing that his defense was at all prejudiced by the delay."[6] Defendant's alleged ill health and his refusal to comply with the trial court's order for production of the exemplars were the primary reasons for the delay. However, the court conceded that the proceedings were delayed at one point due to the unavailability of government witnesses and "conflicting obligations" of the prosecutor. The court held, citing *Barker*, that these reasons were sufficient to justify some delay.[7] In denying the defendant's sixth amendment claim, the court held that the "total circumstances presented" did not rise to the level of a deprivation of the defendants right to a speedy trial.[8]

B. *Confrontation*

The Tenth Circuit, in *United States v. Roberts*,[9] faced the question of whether the right of the accused to confront the witnesses against him[10] was violated by the coconspirator exception to the hearsay rule. The two defendants were tried jointly for importing heroin and for conspiring to import heroin.[11] At trial, tape recordings of telephone conversations between defendant Roberts and an unindicted coconspirator were introduced into evidence against both Roberts and defendant Freeman. In the course of the conversations several passing references concerning Freeman were made by Roberts. Freeman's attorney objected to the introduction of the tapes, but on grounds other than the constitutional issue raised here on appeal.[12]

The Tenth Circuit, in holding that the conversations were admissible against Freeman, distinguished *Bruton* on the basis that in the instant case, unlike *Bruton*, the coconspirator exception[13] to the hearsay rule rendered the statements admissible. The court reasoned that any testimony which is admissible via an exception to the hearsay rule falls outside the purview of *Bruton*. The court noted, however, that the hearsay rule cannot be viewed as a substitute for the confrontation clause.[14]

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6. 584 F.2d at 963. Normally the appellant may not claim denial of his right to a speedy trial when he is the cause of the delay. *See* United States v. Key, 458 F.2d 1189 (10th Cir.), *cert. denied*, 408 U.S. 927 (1972).

7. 584 F.2d at 962.

8. *Id.* at 963. *See also* United States v. Mackay, 491 F.2d 616 (10th Cir. 1973), *cert. denied*, 419 U.S. 1047 (1974). The court also relied on the fact that the appellant had not been incarcerated during most of the time the charge was pending. 584 F.2d at 962. *See also* Barker v. Wingo, 407 U.S. at 532.

9. 583 F.2d 1173 (10th Cir. 1978), *cert. denied*, 99 S. Ct. 862 (1979).

10. This right was set forth by the Supreme Court in Bruton v. U.S., 391 U.S. 123 (1968).

11. 21 U.S.C. §§ 952(a), 962(a), 963 (1976).

12. 583 F.2d at 1175. The court commented that normally a confrontation clause objection must be raised at trial in order for the issue to be preserved for appellate review. *See* Nolan v. United States, 423 F.2d 1031, 1041 (10th Cir. 1969), *cert. denied*, 400 U.S. 848 (1970). However, since the Government failed to challenge the appellant's claim on preservation grounds, the Tenth Circuit proceeded to the merits. *See* United States v. Adams, 446 F.2d 681 (9th Cir.), *cert. denied*, 404 U.S. 943 (1971).

13. 583 F.2d at 1175.

14. *Id.* at 1175-76. *See also* California v. Green, 399 U.S. 149 (1970); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). *See generally* Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529-57 (1974).

After examining the trial record, the Tenth Circuit found that Freeman's rights under the confrontation clause had been adequately protected. In so holding, the court pointed to the fact that the tapes contained only a few references to Freeman; that previous testimony had already established a sufficient nexus between the crimes charged and Freeman's involvement in them; that the evidence provided ample basis for "the jury to test the believability of Robert's references to Freeman;" and that no reason could be inferred from the record that would indicate why Roberts would have misrepresented Freeman's involvement in the importation ring.[15] Indeed, the court noted that any possible questions or ambiguity created by the taped references to Freeman could only have assisted his case "in the face of strong independent evidence of guilt."[16]

C. *Right to Counsel*

In *Baldwin v. Benson*[17] the Tenth Circuit, construing 18 U.S.C. section 4214 and 18 U.S.C. section 3006,[18] significantly enlarged the right to counsel of federal parolees at parole revocation proceedings and overruled several of its previously unpublished decisions. Both petitioners in *Baldwin* had requested that counsel be appointed for them before or at the time of the hearing to revoke parole. Both requests were denied, based upon the interpretation that section 4214 was to be read "in accordance with" section 3006A.[19] The Tenth Circuit began its analysis by noting that the sixth amendment requires the federal government to provide counsel to an indigent defendant at "every stage of a criminal proceeding which involves substantial rights."[20] The court noted, however, that the Supreme Court had held[21] that parole revocation proceedings are not part of criminal prosecutions to the extent that appointment of counsel is required.[22] Yet the Tenth Circuit was quick to point out that *Morrissey* antedated the enactment of section 4212.[23]

Relying primarily upon the Supreme Court's recent decision in *Moody v. Daggett*,[24] the legislative history of the Parole Act,[25] and the language of section 4214(b),[26] the court held that a parolee is entitled to appointed coun-

15. 583 F.2d at 1176-77.
16. *Id.* at 1177.
17. 584 F.2d 953 (10th Cir. 1978).
18. Section 3006A(g) specifically authorizes the trial court to exercise its discretion in determining whether to appoint counsel for the parolee.
19. 584 F.2d at 955.
20. *Id.* (citing Mempha v. Rhay, 389 U.S. 128 (1967) and Johnson v. Zerbst, 304 U.S. 458 (1938)).
21. Morrissey v. Brewer, 408 U.S. 471 (1972).
22. 584 F.2d at 955. *See also* Morrissey v. Brewer, 408 U.S. at 480.
23. 584 F.2d at 956.
24. 429 U.S. 78, 84-85 (1976).
25. 584 F.2d 956-57.
26. 18 U.S.C. § 4214(a)(2)(B) (1976) reads:

> [O]pportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel), counsel *shall* be provided pursuant to section 3006(A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation (emphasis added).

sel if properly requested.[27] The Tenth Circuit, seizing upon the phrase "shall be provided counsel," stated that the "new parole act undertakes to provide for due process at every stage of the proceedings, and in this connection it provides for the right to counsel at each stage."[28] The court also noted that the new act requires that notice be given to the parolee of the pending revocation proceeding and that, where requested, counsel be provided, not only at the revocation hearing, but with respect to other actions taken incident to such revocation.[29]

In closing, the court noted a line of its decisions, many of which were unpublished, which had reached a contrary conclusion. The Tenth Circuit overruled those decision as "not in accord with the Act of Congress."[30]

II. FOURTH AMENDMENT

A. *Consent Search*

In *United States v. Stevens*[31] the Tenth Circuit ruled that the consent to search given by the defendant to police officers was voluntary and thus evidence obtained by the search was admissible at defendant's trial for possession of an unregistered firearm.[32] The facts in the case indicated that police, in response to a call, went to a motel room where the defendant was staying. The officers informed the defendant that they had been told a person in the motel had a shotgun and had threatened to kill someone. The policemen then asked the defendant if they could "look around for the shotgun." The defendant gave his consent and the officers found the shotgun in a suitcase under some clothing.[33]

Prior to trial the defendant moved to suppress the firearm, alleging that it was the fruit of an illegal search and seizure. The defendant attempted to buttress this contention by emphasizing his youth, his lack of education, and the fact that he was neither advised nor was he aware that he could resist the search and insist that a search warrant be obtained.[34] The government, conceding the lack of a search warrant, relied upon the defendant's consent to the search. Defendant's motion to suppress was denied by the trial court, but was raised again at trial when the gun was offered into evidence. Again the trial court overruled the objection, the gun was admitted into evidence, and the defendant was convicted.[35]

The Tenth Circuit, citing *Schneckloth v. Bustamonte*,[36] noted that the Government, in the consent search context, is not required to show that the de-

27. 584 F.2d at 957-58.
28. *Id.* at 957.
29. *Id.* at 958.
30. *Id.* at 959. *See* Robinson v. Benson, 570 F.2d 920 (10th Cir. 1978); Cotner v. United States, 409 F.2d 853 (10th Cir. 1969).
31. 595 F.2d 569 (10th Cir. 1979).
32. 26 U.S.C. § 5861(d) (1976).
33. 595 F.2d at 570. The appellant later testified he gave his consent only after officers had begun the search.
34. *Id.* at 570-71.
35. *Id.* at 570.
36. 412 U.S. 218 (1973).

fendant knew he could refuse to give his consent, nor that he was advised of his right to refuse consent.[37] Rather, the court turned its inquiry to the issue of the voluntariness of the consent and looked to the totality of the circumstances. Quoting *Schneckloth* the court held that: "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."[38] The appellate court, relying upon the above quoted language, ruled that the decision of the trial court was in accord with the principles enunciated in *Schneckloth*.[39]

The Tenth Circuit, in affirming Stevens' conviction, then distinguished *United States v. Rodriguez*,[40] as a situation involving acquiescence by a person who spoke little English in the face of a claim of lawful authority, and *Villano v. United States*,[41] in which the consent was tainted by the fact the defendant was in custody at the time of the consent, and by several factors amounting to express coercion.

B. *Warrantless Searches*

In *United States v. Erb*,[42] the Tenth Circuit validated a warrantless "limited protective search" of a private residence conducted by federal drug agents who suspected that the manufacture of narcotics was taking place. The court found the existence of both probable cause for the search and exigent circumstances sufficient to vitiate the necessity of obtaining a search warrant.[43]

In *Erb*, a reliable informant had told drug agents that a certain Corwin was engaged in the manufacture of drugs. One evening, agents followed Corwin and were lead to a residential structure in Denver, Colorado. Almost immediately upon arrival, the agents detected the strong odor of ether, a substance often used in the illicit manufacture of methamphetamine, emanating from the residence. Various persons, including Corwin, entered and left the house during the course of the officer's observation.[44] At about 1 a.m., approximately three hours after the drug agents had begun their surveillance of the home, one of the agents contacted the reliable informant by telephone. The informant told the officer that the manufacture of drugs was under way inside the house and was scheduled to be completed by 8 a.m. that day. Shortly after 2:30 a.m. Corwin again arrived at the residence. The agents became concerned that the manufacturing process was nearing completion more rapidly than they had expected. They believed that Corwin had arrived to pick up his "share" of the drugs.[45] Officers also feared that

37. 595 F.2d at 571.
38. *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. at 248-49).
39. 595 F.2d at 571.
40. 525 F.2d 1313 (10th Cir. 1975).
41. 310 F.2d 680 (10th Cir. 1962).
42. 596 F.2d 412 (10th Cir. 1979).
43. *Id.* at 417.
44. *Id.* at 414-15.
45. *Id.* at 415.

the drug manufacturing mechanisms and materials, which they believed the home contained, were about to be dismantled and removed. The agents discussed the situation and came to the conclusion that a search warrant for the home could not be obtained for about five hours, far too late to seize the drug laboratory intact. During all of this time the officers were unable to see anything taking place inside the residence.[46]

Shortly before 3 a.m. the officers forcibly entered the home, arrested the occupants, secured the premises, insured that the chemicals posed no threat of explosion, and then, with the arrested persons, left the house.[47] Some drug agents remained outside the home, to prevent any tampering with either the house or the laboratory within, until a search warrant for the premises was obtained and executed.[48] At the appellants' trial, the laboratory items and assorted chemicals, commonly used in the manufacture of drugs, were introduced into evidence against the defendants.

The Tenth Circuit found, on the basis of the facts set out above, that (1) the officers had probable cause to make the forced entry, arrest the appellants, and secure the premises; and (2) the exigent circumstances present here justified them doing so without a search warrant.[49] Further, the court emphasized that after securing the premises the agents had obtained a search warrant before seizing the lab equipment and chemicals. Thus, the court reasoned, no violence had been done to the fourth amendment.[50]

Without squarely dealing with the issue, the court also stated, citing *United States v. Watson*,[51] that government agents, armed with probable cause, may, even in the absence of exigent circumstances, search public places without a search warrant. While not explicitly so holding, the court noted that although the building in the instant case was a house, it could hardly be considered a "family abode or dwelling" in view of the fact the structure was being used for the clandestine manufacture of a controlled substance.[52] Therefore, the court implied that *Watson* might be applicable in circumstances like those present in *Erb*.

In a concurring opinion, Judge McKay balked at the idea that this holding of the court might be construed as stating that a warrantless search of a private residence might be justified absent exigent circumstances[53] or that the place searched in *Erb* could be construed to be a public building.[54]

C. *Statements of the Accused*

In *Gamble v. Oklahoma*,[55] the Tenth Circuit granted the petitioner habeas

46. *Id.*
47. *Id.* at 415-16.
48. *Id.* at 416.
49. *Id.* at 417.
50. *Id.* at 417-18.
51. 423 U.S. 411 (1976). The public place in *Watson* was, however, a restaurant. *Id.*
52. *Id.* at 420. *See also* Gerstein v. Pugh, 420 U.S. 103 (1975).
53. 596 F.2d at 422 (McKay, J., concurring).
54. Judge McKay commented that he did not believe the court's decision went as far as holding the house in *Erb* was a public place. Thus, the judge apparently felt that the court's discussion of *Watson* was merely dictum. *Id.*
55. 583 F.2d 1161 (10th Cir. 1978).

corpus relief after determining that statements made by him, extracted in the context of a fourth amendment violation, had been improperly introduced against him at his trial in state court. The facts indicated that the petitioner had been illegally arrested and transported by police at gunpoint to his home. Here the officers, pursuant to a search warrant which they had previously obtained, searched the home. The search turned up evidence of drug dealing, and the officers also found a locked brief case.[56] The police asked petitioner for the key to the case. After first denying any knowledge of the key, the petitioner made "inculpatory statements" to officers, telling them where they could find the key. The case was opened and found to contain drug related evidence which was damaging to the petitioner.[57] The law enforcement officers then asked the petitioner if there were any other drugs in the house, adding that if they did not receive the petitioner's cooperation in the search they "would tear the house apart,"[58] and the petitioner then made further inculpatory statements which lead the officers to additional drug-related evidence. Sometime during the search the officers formally arrested the petitioner and read him a *Miranda* warning.[59]

The Oklahoma courts suppressed the statements made by the petitioner prior to the time that he had received the *Miranda* warning. They held, however, that his statements following the *Miranda* warning were admissible against him.[60] The petitioner was convicted of unlawful possession of drugs and unlawful possession of drugs with the intent to distribute them. Upon reaching the merits of the case,[61] the Tenth Circuit noted that although the evidence challenged here consisted in part of oral statements made by the accused, he was nevertheless entitled to fourth amendment protection.[62] The court also stated that the situation in the instant case was controlled by *Brown v. Illinois*[63] which had held that *Miranda* warnings alone could not obviate the taint of evidence seized in violation of the fourth amendment.[64] Since from the record before the court it appeared that the Oklahoma courts had not followed, and perhaps even ignored *Brown*, the Tenth Circuit affirmed the federal district court's order that Oklahoma either release the petitioner or give him a new trial.[65]

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56. *Id.* at 1162-63.

57. *Id.* at 1163.

58. *Id.*

59. *Id.* The court does not indicate just when the *Miranda* warnings were given to the appellant. *Compare* the statement of facts given by the Oklahoma court on the petitioner's direct appeal in Gamble v. State, 546 P.2d 1336 (Okla. Crim. App. 1976).

60. 583 F.2d at 1163.

61. Before reaching the merits, the court determined that the constitutional issue had not been fully and fairly litigated by the parties in the state courts. Thus, the petitioner was allowed to raise his substantive claim in federal court. *Id.* at 1163-64. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963). *See also* Note, *Applying* Stone v. Powell: *Full and Fair Litigation of a Fourth Amendment Habeas Corpus Claim*, 35 WASH. & LEE L. REV. 319 (1978).

62. With reference to the rule that oral statements are entitled to protection under the fourth amendment, *see* Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975).

63. 422 U.S. 590.

64. *Id.* at 603-04. *See* Note, *Criminal Law—Giving of Miranda Warning Does Not Per Se Purge the Taint of an Unlawful Arrest and Render Post Arrest Statements Admissible*, 25 DRAKE L. REV. 513-20 (1975).

65. 583 F.2d at 1166.

III. STATUTORY INTERPRETATION

A. *18 U.S.C. § 922*

The Tenth Circuit, in *United States v. Kilburn*,[66] had occasion to interpret 18 U.S.C. § 922(h)[67] in light of an alleged intrastate purchase of a firearm. The appellant had been convicted of receiving a firearm after a previous felony conviction in violation of the statute. On appeal he argued that, since his roundabout purchase of the weapon had taken place entirely within the state of Utah, the purchase and possession of the gun was a totally intrastate transaction thus rendering section 922 inapplicable.[68]

Following *Barrett v. United States*,[69] the Tenth Circuit rejected this narrow reading of the statute. The court held that a showing that the firearm had moved at any time in interstate commerce was sufficient to meet the jurisdictional requirement of the statute and to sustain a conviction under it.[70]

In *United States v. Brzoticky*,[71] the Tenth Circuit interpreted the prior conviction provision of section 922(h).[72] The trial court dismissed the case, holding that, since the prior conviction of the defendant in a state court had been secured by a *nolo contendere* plea which was expunged before the appellant's trial in federal court, section 922(h) did not apply. The Tenth Circuit, in setting aside the dismissal and remanding the case to the trial court, first noted that state law rather than federal law controlled the question of whether appellant had a prior conviction within the meaning of section 922. Thus, the court turned to Colorado law and held that under that state's law a *nolo* plea results in a "conviction" for the accused.[73] The court then determined that, because the expungement of the appellant's previous conviction took place after the section 922 charges were filed against him, he could still be considered, for the purchase of the charges at bar, to have a prior conviction.[74]

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66. 596 F.2d 928 (10th Cir. 1978), *cert. denied*, 99 S. Ct. 1517 (1979).

67. 18 U.S.C. § 922(h) (1976) reads:

It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice; (or)

. . . .

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution; to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

68. 596 F.2d at 931. *See* Tot v. United States, 319 U.S. 463 (1943) [construing § 922(h)'s predecessor, a statute similar to § 922(h)].

69. 423 U.S. 212 (1975).

70. 596 F.2d 933-34. The court also discussed the relationship of § 922 to provisions of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 1202(a). *Id.* at 932-34; 423 U.S. at 216. For a discussion of the latter *see* Note, *The Government Must Specifically Allege and Prove That Possession of Firearms is "In Commerce or Affecting Commerce" Under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968*, 9 HOUS. L. REV. 160 (1971); Note, *Interstate Commerce Nexus Requirement Defined for Firearm Possession by Felons*, 29 MERCER L. REV. 867 (1977-78).

71. 588 F.2d 773 (10th Cir. 1978).

72. *See* note 67 *supra*.

73. 588 F.2d at 775.

74. *Id.*

Judge Doyle concurred only in the result reached by the majority. The judge argued that federal law controlled, criticizing the majority's reasoning since it allowed, in his opinion, "the state definition of conviction to determine whether an element in a federal crime has been proven."[75] Then, turning to federal law, Judge Doyle determined that the appellant's *nolo* plea was a conviction for the purposes of section 922.[76]

B. *18 U.S.C. § 641*

In *United States v. Leavitt*[77] the appellants were convicted of the theft of logs from the government.[78] The men ran a timber business and had a contract for the purchase of logs from the federal government. Among their grounds for appeal, defendants alleged that, based upon their contract with the government, theft from the government was legally impossible in the case since (1) the government did not own the logs at the time they were taken by the appellants; or in the alternative, (2) the government had consented to the taking of the timber.[79]

After examining the relevant portion of the contract in question, the Tenth Circuit concluded that the title to the logs had not passed to the defendants, and therefore, the appellants' first claim failed.[80] Turning to the second contention the court stated, citing *Morissette v. United States*,[81] that they would not be bound by the common law definitions of theft, but where theft was defined broadly, as in the instant case, it should be construed by the courts. In ruling on the second point against the appellants the court held that the government, by merely consenting to the possession of its property by the appellants, had not thereby consented to their theft of the property.[82]

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75. *Id.* (Doyle, J., concurring).

76. *Id.* at 776-78. *See also* United States v. Place, 561 F.2d 213 (10th Cir.), *cert. denied*, 434 U.S. 1000 (1977).

77. 599 F.2d 355 (10th Cir. 1979).

78. 18 U.S.C. § 641 (1976) provides in part: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, . . . any record, voucher, money, or thing of value of the United States or any department or agency thereof, . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ." At the Leavitt-Johnson trial the Government's evidence indicated that the appellants had converted logs worth about $29,000. 599 F.2d at 359.

79. 599 F.2d at 359-60.

80. *Id.* at 359-60. A portion of the contract read:

> All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been cut, Scaled, removed from Sale Area or other designated cutting area and paid for, at which time title shall vest in purchaser. For purposes of this Subsection, timber cut under cash deposit, Effective Purchaser Credit or payment guarantee under B4.3 shall be considered to have been paid for.

Id. at 359. This language coupled with the appellants' having obtained $30,000 surety bond was the basis of the appellants' legal impossibility argument which was rejected by the court.

81. 342 U.S. 246, 271 (1952).

82. 599 F.2d at 360. The appellants also argued that the Government's criminal case must fail and that it was instead limited to a suit for breach of contract. The Tenth Circuit found this argument to be without merit. *Id.* at 360-61. *See also* United States v. Dupee, 569 F.2d 1061 (9th Cir. 1978); United States v. Johnson, 268 U.S. 220 (1925).

C. *16 U.S.C. § 703*

In *United States v. Conners*,[83] appellant, in the course of a Colorado Retrievers Club field trial, shot and killed a number of mallards which had flown uninvited into a lake thus invading and disrupting the contest. He was convicted of killing migratory birds. The Tenth Circuit looked to international treaties between the United States, Great Britain, and Japan and to U.S. Fish and Wildlife Service regulations to determine if under 16 U.S.C. § 703[84] the birds protected were required to be "wild" or merely "captive-reared." The court seized upon the fact that the U.S. Fish and Wildlife Service's regulations defining "migratory game birds" made specific reference to wild ducks.[85] Then the court remanded the case to the trial court for a determination of whether the dead ducks had been wild, in which case the appellant's conviction would be affirmed, or whether they had been captive-reared, in which case the appellant's conviction could not stand. In doing so, the court distinguished *United States v. Richards*[86] on the basis that in the latter case the birds in question were falconidae, and therefore not members of the duck family.[87]

Judge Holloway stated in dissent that he would draw no fine distinction, as the majority did, between the terms "wild" and "captive-reared."[88]

D. *18 U.S.C. § 844(i)*

Noting that criminal statutes are to be strictly construed and that ambiguities are to be resolved in favor of the accused, the Tenth Circuit, in *United States v. Schwanke*,[89] dealt with the provisions of 18 U.S.C. § 844.[90] The appellants were charged and convicted of destroying a building by the use of

83. 606 F.2d 269 (10th Cir. 1979).

84. 16 U.S.C. § 703 (1976) reads in part:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

85. 606 F.2d at 272. The court also pointed to similar language contained in the treaties. *Id.* at 271.

86. 583 F.2d 491 (10th Cir. 1978).

87. 606 F.2d at 272 n.4.

88. *Id.* at 273-74. (Holloway, J., dissenting).

89. 598 F.2d 575, 579 (10th Cir. 1979). *See also* United States v. Enmons, 410 U.S. 396, 411 (1973).

90. 18 U.S.C. § 844(i) (1976) reads:

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000 or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

an explosive. Pursuant to the statute's provisions two of the defendants' sentences were enhanced since the one defendant who had physically destroyed the building had injured himself in doing so.[91] Analogizing the case to those involving the felony-murder doctrine,[92] the court concluded that the punishment could not be enhanced in situations where the only individual injured by the blast was the person responsible for the building's demise.[93]

In a footnote, Judge Barrett dissented from the above holding, basing his analysis upon the relevant language of the statute. Thus, he believed the term " 'if personal injury results' could not be equated with the term 'injured person.' "[94]

Before reaching the issue discussed above, the majority determined that the destroyed building, located in Oklahoma, was protected by federal law. This was so because the building had housed a store which had purchased candy, gum, and vegetables from Arkansas. Thus, the interstate commerce provision of section 844 had been satisfied since Congress had the power to regulate interstate commerce even though the effect on interstate commerce was de minimis.[95]

E. *18 U.S.C. § 641*

The argument advanced by the appellant in *United States v. Larsen*[96] was that he had been convicted of theft of government property under a general statute, providing for a stiff punishment, when a more specific statute made the same activity a misdemeanor with a less serious punishment.[97] The appellant was convicted of stealing government timber under the general theft statute and argued that the existence of a specific statute precluded prosecution under the more general statute. The Tenth Circuit cited the well known rule that the same transaction may constitute two or more offenses as long as each offense requires some proof of an element not required in the

91. 598 F.2d at 578-79.

92. *See, e.g.*, People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). For discussions of the felony-murder doctrine and the concept of vicarious criminal liability, *see generally* Comment, *Criminal Law—Homicide—Felony-Murder—Felons can be Held Responsible Under the New Jersey Murder Statute for the Death of an Innocent Party Killed by Police Attempting to Apprehend the Felons*, 24 RUTGERS L. REV. 591 (1970); *Criminal Law—Murder—Felony Murder Rule*, 9 DUQ. L. REV. 122 (1970); *Felony Murder—Felon Not Responsible for Accidental Death of Bystander Shot by Police*, 74 DICK. L. REV. 756 (1970); and *Criminal Law—Felony-Murder—Vicarious Liability—A Felon Can Be Held Responsible For a Murder Committed by a Fear-Motivated Victim—Responsibility is Based on a Theory of Vicarious Liability and Not Felony-Murder*, 3 ST. MARY'S L.J. 158 (1971).

93. 598 F.2d at 579.

94. *Id.* at 580 n.3.

95. *Id.* at 578.

96. 596 F.2d 410 (10th Cir. 1979).

97. For a reading of the theft statute, 18 U.S.C. § 641 (1976), *see* note 78 *supra*. The statute covering the unlawful cutting of government timber, 18 U.S.C. § 1852 (1976), reads in part:

> Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or
>
> Whoever removes any timber from said public lands, with intent to export or to dispose of the same; . . . .
>
> Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

other[98] and affirmed the appellant's conviction. Further, the court emphasized the fact that the statutes, as separate and distinct laws, were aimed at different evils.[99]

F. *15 U.S.C. § 1644*

Whether federal jurisdiction is conferred, bringing section 1644[100] into play, when intrastate purchases are made with a credit card stolen in the same state where the purchases were made, but the goods purchased have moved in interstate commerce, was the question presented in *United States v. Lomax*.[101] In *Lomax*, the defendant had used a credit card stolen in Kansas to make a number of purchases in that state. At trial, the government showed that the invoices for the items purchases with the stolen card had been sent to a credit card records center in Kansas City, Missouri. Before affirming the appellant's conviction the Tenth Circuit noted, as had the Supreme Court in *United States v. Maze*,[102] the staggering proportions and costs to which the fraudulent credit card problem had grown.[103]

Relying on the broad language of the statute and upon the fact that there had been at least a minimal affect on interstate commerce, the court held that this effect on interstate commerce was sufficient to confer jurisdiction under the statute.[104]

IV. FIFTH AMENDMENT

A. *Due Process*

In *United States v. Glist*,[105] the Tenth Circuit considered the question of whether pre-indictment delay caused by the Government, coupled with a general pattern of unfair practices used by government agents to build a case against the appellants, resulted in a denial of due process. The trial court had dismissed the charges[106] against the defendants calling them "stale" and holding that the appellants had been the victims of prejudicial pre-indict-

98. 596 F.2d at 411. *See also* United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974).

99. 596 F.2d at 411. *See* United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

100. 15 U.S.C. § 1644 (1976) reads in part:

> Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating of $1,000 or more;
>
> . . . .
>
> shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

101. 598 F.2d 582 (10th Cir. 1979).

102. 414 U.S. 395 (1974).

103. *See* 598 F.2d at 583 n.2 (citing *Maze*, 414 U.S. at 416 (White, J., dissenting)).

104. 598 F.2d at 584.

105. 594 F.2d 1374 (10th Cir. 1979).

106. The court first addressed the issue of whether the Government could appeal the dismissal. The Tenth Circuit commented that an appeal was possible only if jeopardy had not attached. Due to the fact that the court resolved the case on the grounds of pre-indictment delay, it reached no determination of the double jeopardy issue. *Id.* at 1376-77.

ment delay by the Government.[107] The Tenth Circuit held that the findings of the trial court were supported by the record. But the court noted, " 'proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.' "[108] Further, the court noted that more than mere negligence on the part of the Government is required before the prejudice to the defendant can rise to the level of a denial of due process sufficient to justify dismissal of an indictment.[109]

Citing numerous faults with the government agents' handling of the investigation; *i.e.*, the fact that the Government's files on the case were scattered "among many people and offices," the fact that government officials had not listened to nor read various materials alleged to contain evidence exculpatory to the defendants, and the fact that a government agent had cut off a transcript of a tape shortly before an exculpatory statement was made concerning one of the appellants, the court found grounds sufficient to affirm the lower court's dismissal of the charges against the appellants.[110]

B. *Self-Incrimination*

In *United States v. Bridwell*,[111] a physician challenged his conviction for conspiracy to distribute controlled substances.[112] One of the grounds he urged on appeal was that the trial court erred in admitting into evidence certain of his statements concerning his drug inventories, which were made to investigators during the course of an audit of the doctor's office. The appellant contended that he should have been given a *Miranda* warning prior to the questioning by the agents. The Tenth Circuit rejected the argument, noting that *Miranda v. Arizona*[113] applied only to custodial interrogations.[114] The court analogized Bridwell's case with *Beckwith v. United States*,[115] in which the court rejected arguments that the *Miranda* warnings should be given once the investigation had "focused" upon a defendant or that the warnings are required when a subject is placed under "mental restraint."[116] Thus, the Tenth Circuit held that the evidence against Bridwell was properly admitted.

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107. *Id.* at 1377.

108. *Id.* at 1378 (citing United States v. Lavasco, 431 U.S. 783, 790 (1977)). *See* Comment, *Criminal Procedure: Due Process Requires Dismissal of Charges Where Government Pre-Indictment Delay Prejudices Defendant*, 61 MINN. L. REV. 509 (1977).

109. 594 F.2d at 1378. *See also* United States v. Radmall, 591 F.2d 548 (10th Cir. 1978); United States v. Revada, 574 F.2d 1047 (10th Cir. 1978).

110. 594 F.2d at 1378.

111. 583 F.2d 1135 (10th Cir. 1978).

112. 21 U.S.C. §§ 841(a)(1), 846 (1976). Dr. Bridwell was also convicted of distributing controlled substances in violation of § 841(a)(1) and of failure to maintain accurate records regarding the dispensing of the drugs in violation of § 842(a)(5).

113. 384 U.S. 436 (1966).

114. 583 F.2d at 1138. The court commented that the *Miranda* court had held the warnings must be given when a suspect " 'has been taken into custody or otherwise deprived of his freedom of actions in any significant way.' " *Id.* (citing *Miranda*, 384 U.S. at 444). *See also* Note, *Criminal Procedure—Defining "Custodial Interrogation" for the Purposes of* Miranda, 57 OR. L. REV. 184 (1977).

115. 425 U.S. 341 (1976).

116. 583 F.2d at 1138. *See also Beckwith*, 425 U.S. at 345.

The court did, however, find error in the trial court's allowing into evidence the testimony of a government agent that the defendant had refused to sign a form waiving his *Miranda* rights, holding that such was improper evidence of a defendant's silence, because of his fifth amendment rights.[117] But the appellate court held, that based upon the trial court's immediate instruction to the jury to disregard the above mentioned testimony, and the strong evidence of the accused's guilt, the error was harmless beyond a reasonable doubt and, therefore, would not justify reversal of the physician's conviction.[118]

The Tenth Circuit dealt with a somewhat different fifth amendment problem in *United States v. Scott*.[119] There, an appellant's statement to federal agents was used by the Government to impeach his testimony at trial. The appellant alleged that before the statement could be used to impeach him, the Government was required to show that the statement had been voluntarily given. Indeed, the appellant cited *Wheeler v. United States*[120] which held in part that "it is reasonable to require the Government to meet the burden of showing that the statement was voluntarily made after the accused had been fully advised of all his rights and had effectively waived them in accordance with the standards prescribed by *Miranda*."[121] But the Tenth Circuit stated that the matter had been resolved to the contrary by the Supreme Court in *Harris v. New York*[122] which held that statements made by a defendant subject to custodial interrogation could be used to impeach him even though the requirements of *Miranda* had not been met.[123] Thus, the court held that *Wheeler* was no longer controlling in such a situation and that, in the absence of a specific allegation or evidence of coercion or duress, the Government was not required to prove that a statement was voluntarily given before its introduction for impeachment purposes.[124]

C. *Double Jeopardy*

In *United States v. Huffman*,[125] the appellant entered into a leasing agreement with a Chicago company whereby he leased a tractor-trailer unit for hauling goods from Illinois to California. The cargo, which was also part of the leasing arrangement, consisted of canned hams and ham hocks. During the course of the trip the appellant, apparently without authority, sold the hams and ham hocks for his private gain. The defendant was located and subsequently charged with theft of government property.[126]

Sometime after the case had been set for trial, the Government discovered that title to the cargo had not yet vested in the United States at the

117. 583 F.2d at 1138-39.
118. *Id.* at 1139.
119. 592 F.2d 1139 (10th Cir. 1979).
120. 382 F.2d 998 (10th Cir. 1967).
121. 592 F.2d at 114.
122. 401 U.S. 222 (1971).
123. 592 F.2d at 1141.
124. In *Scott* the court found no evidence of coercion or duress. *Id.* at 1142.
125. 595 F.2d 551 (10th Cir. 1979).
126. *Id.* at 553. The theft charges were filed pursuant to 18 U.S.C. §§ 641, 642 (1976).

time the defendant allegedly sold the ham. Thus, the Government moved to dismiss the theft of government property charge and filed new charges alleging that appellant was guilty of theft from an interstate shipment.[127] On the trial date the Government renewed its motion, but the court ordered a jury impaneled in the cause sworn. After this was done the Government advised the court that it could not prove that the hams had belonged to the United States. As a result the court granted judgement of acquittal for the defendant.[128]

Later the appellant was tried and convicted of the theft from an interstate shipment charge. He argued (1) that conviction on the second charge had subjected him to double jeopardy in violation of the fifth amendment; or in the alternative (2) that the Government was collaterally estopped from introducing evidence at the second trial of any element of which he had been acquitted of on the theft of government property charge.[129]

In response to the double jeopardy claim, the Government, citing *United States v. Appawoo*,[130]contended that it was entitled to appeal from the previous judgement of acquittal, since the acquittal allegedly had been improperly granted, and that the court should have heard the motion to dismiss before the jury had been impaneled.[131]

The Tenth Circuit ruled against the Government on this point by distinguishing *Appawoo* from the instant case on the ground that no appeal from the preceding acquittal had been made by the Government. Rather, the Government was, in a subsequent proceeding, attempting to attack the validity of the acquittal on the theft of government property charge.[132] The Government's second contention, with respect to the appellant's double jeopardy claim, was that the respective charges were separate and distinct, and thus there would be no violation of the appellant's right not to be subjected to double jeopardy. The court agreed, and held, in overruling the appellant's first point that each of the statutes in question contained an additional element requiring proof not required in the other.[133] Thus, trying the appellant on the subsequent charge did not violate the prohibition against double jeopardy.[134] At the same time, the court declined to adopt the "same transaction rule" urged by the appellant, which would allow the prosecution to charge only one crime per any given incident of criminal activity by a given defendant.[135]

The court then addressed the appellant's collateral estoppel claim, not-

127. 595 F.2d at 553.
128. *Id.*
129. *Id.*
130. 553 F.2d 1242 (10th Cir. 1977). *Appawoo* was consolidated on appeal with United States v. Casey, 553 F.2d 1242 (10th Cir. 1977).
131. 595 F.2d at 554.
132. *Id.*
133. *See* Blockburger v. United States, 284 U.S. 299 (1932). *See also* Cox v. Gaffney, 459 F.2d 50 (10th Cir.), *cert. denied*, 409 U.S. 863 (1972).
134. 595 F.2d at 554-55.
135. *Id. See* United States v. Addington, 471 F.2d 560, 568 (10th Cir. 1973); Birch v. United States, 451 F.2d 165, 167 (10th Cir. 1971). *See also* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 AM. CRIM. L. REV. 259 (1977-78).

ing that the standard for review was one of rationality, "with a practical frame with an eye to all the circumstances of the proceedings."[136] Thus the court carefully examined the lower court record and determined that, as the Government had urged, the only issue to which the collateral estoppel claim could apply was the issue of the government's ownership of the ham. Since this issue was not an element of the theft from an interstate shipment charge the appellant's fifth amendment claims failed and his conviction was affirmed.[137]

In *United States v. Rich*,[138] the Tenth Circuit dealt with a somewhat different double jeopardy question. In *Rich*, the appellant was charged with committing fraud on a bankruptcy trustee.[139] His first trial ended in a mistrial when the jury was unable to reach a verdict. At retrial, a jury was selected without the appellant being present but with his consent. Then, before the trial could proceed any further, the Government was granted a continuance because its key attorney could not be present to begin the trial.[140] For about six weeks neither the Government nor the appellant attempted to move the case to trial. One day the appellant's attorney met the judge in the hallway of the federal courthouse and the men went to the judge's chambers. The trial judge asked the defense attorney if he really wanted to try the case. The defense attorney replied that he did not and that he felt his client was innocent and should never have been charged. The judge instructed his clerk to prepare an order discharging the jury. Appellant's counsel told the judge that if the jury was discharged he would oppose his client's retrial on double jeopardy grounds.[141] The judge made no reply and the jury was discharged, without notification of the Government's attorneys.

In a subsequent hearing, the appellant moved for dismissal of the indictment against him on the grounds of double jeopardy and upon a claim that he had been deprived of his right to a speedy trial in contravention of the sixth amendment.[142]

The Government submitted that the retrial was not barred by the double jeopardy clause because, in his conversation with the trial judge, appellant's attorney had impliedly consented to the jury's discharge. Further, the Government argued that the double jeopardy issue had to be resolved in its favor because the conversation between the defense counsel and the trial judge had brought about a termination of the prosecution of the appellant

136. 595 F.2d at 555.

137. *Id.* at 555-56. *See* Ashe v. Swenson, 397 U.S. 436 (1970). *Ashe* held that whenever an ultimate issue of fact has been litigated in a defendant's favor, it may not be relitigated by the prosecution in a subsequent proceeding against the defendant. *See also Collateral and Equitable Estoppel of Federal Criminal Defendants*, 29 RUTGERS L. REV. 1221 (1976); Note, *Criminal Law—The Doctrine of Collateral Estoppel and the Mutually Exclusive Offense Rule*, 11 WAKE FOREST L. REV. 691 (1975); and Rich, *Collateral Estoppel: A Constitutional Guarantee*, 50 B.U. L. REV. 604 (1970).

138. 589 F.2d 1025 (10th Cir. 1978).

139. 18 U.S.C. § 152 (1976).

140. 589 F.2d at 1026-27.

141. *Id.* at 1027.

142. Even though the appellate court ruled that Rich could not be retried, it did note that the trial court had erred in holding that he had been deprived of his right to a speedy trial. *Id.* at 1033-34.

without a factual determination of the latter's guilt or innocence on the charge.[143]

The Tenth Circuit began its analysis by noting that the general rule was that jeopardy attaches with the impaneling and swearing of a jury.[144] The court, however, acknowledged that there were exceptions to this general rule. The Tenth Circuit stated that, absent prosecutorial or judicial misconduct or bad faith, the trial judge may declare a mistrial, even against the wishes of a defendant when such action is warranted by "manifest necessity."[145] But the court noted that none of the many policy reasons behind the ban on double jeopardy were applicable to the appellant in this case. He had not been subjected to the embarrassment, expense and ordeal which many defendants face after their trials had begun. Nor could it be argued that the swearing and impaneling of the jury had subjected Rich to intense mental anguish since he had not been present when it was selected.[146] Nevertheless, the court held, citing *Crist v. Bretz*,[147] that the appellant could not be retried.[148] After noting that one of the major interests which the double jeopardy clause seeks to protect is the right of the accused to have a particular chosen jury decide the case, the Tenth Circuit held that *Crist* made it plain that:

> [J]eopardy attaches in a criminal trial when the jury is empaneled and sworn and that the Double Jeopardy Clause prevents a subsequent prosecution of a defendant whose previous trial has ended with the discharge of the jury before it has rendered a verdict unless: (1) findings of "manifest necessity" justifying the trial court's discharge of the first jury appear by express declaration of the court, regardless of the terminology of the order or are apparent from the trial court record, or (2) the defendant consents to the trial court's order discharging the jury upon either the Government's or the trial court's motion, or waives the right to later object thereto.[149]

The appellate court then noted that there was no evidence that the trial judge had acted in bad faith or that the decision to discharge the jury had been dictated by manifest necessity. After examining the statements made by the defense counsel to the judge, the court concluded that the statements would hardly be considered consent or waiver of a double jeopardy objection.[150] Moreover, the Tenth Circuit held that the appellant's attorney had not expressly nor impliedly consented to the trial court's action. Even if the attorney had, retrial would still be precluded since the attorney was not em-

143. *Id.* at 1027.

144. *Id.* at 1028. *See* Serfass v. United States, 420 U.S. 377 (1975); United States v. Fay, 553 F.2d 1247 (10th Cir. 1977).

145. 589 F.2d at 1028. *See also* Arizona v. Washington, 434 U.S. 497 (1978); Simmons v. United States, 142 U.S. 148 (1891).

146. 589 F.2d at 1029-30.

147. 437 U.S. 28 (1978).

148. 589 F.2d at 1030. *See also* Wade v. Hunter, 336 U.S. 684 (1949).

149. 589 F.2d at 1031-32. *See generally* Comment, *Criminal Law—Double Jeopardy—Retrial After Sua Sponte. Declaration of Mistrial Over Defendant's Objection Prohibited Where Record Discloses a Viable Alternative to Mistrial*, 10 RUT.-CAM. L.J. 457 (1979).

150. 589 F.2d at 1032.

powered to waive such a fundamental right for his client without first informing him and receiving permission to give such consent.[151] Thus, the Government was barred from retrying the appellant on the same charge.

In *United States v. Padilla*,[152] the Tenth Circuit had occasion to address a claim by the appellant that the U.S. Attorney's Office was not abiding by the *Petite* policy[153] set down by the U.S. Department of Justice. In *Padilla*, the appellant was charged by the State of New Mexico with trafficking heroin. The appellant, pursuant to a plea bargaining agreement with state prosecutors, pleaded guilty to one count and was given a three year deferred sentence. The state did not prosecute the remaining five counts. Thereafter the state prosecutor became an Assistant U.S. Attorney.[154] Subsequently, appellant was indicted by a federal grand jury on five counts of possession with the intent to distribute and one count of the distribution of heroin.[155] The indictment was based upon the same transaction which had been the foundation of the aforementioned state charges.

On appeal, the appellant asserted three grounds for the dismissal of the federal charges against him: (1) the plea bargaining agreement between himself and state prosecutors was binding on the Government since the then state prosecutor became the Government attorney responsible for prosecuting the appellant in federal court; (2) the double jeopardy clause precluded the government from trying him on the federal charges because they arose out of the same transactions which were the subjects of the state charges to which he had pleaded guilty; and (3) his rights had been violated by the failure of the Government to follow its own *Petite* policy.

The Tenth Circuit noted that there was no evidence that the state plea bargaining agreement had been designed to encompass the possibility of a subsequent federal prosecution, and therefore ruled against the appellant on that point.[156] With respect to the appellant's double jeopardy claim, the court, quoting extensively from *United States v. Lanza*,[157] held: "We have here two sovereignties, deriving power from different sources capable of dealing with the same subject-matter within the same territory. . . . Each government [state and federal] in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[158] Thus, the Tenth Circuit concluded that the federal prosecution was not precluded by the fact that state charges had been filed and resolved against the defendant, although both arose out of the same incident.

The Tenth Circuit then turned to the *Petite* policy argument. That policy, promulgated by the Justice Department, dictates that following a state

151. *Id.*
152. 589 F.2d 481 (10th Cir. 1978).
153. See text accompanying note 158 *infra*.
154. *Id.* at 483.
155. 21 U.S.C. § 841(a)(1) (1976).
156. 589 F.2d at 484.
157. 260 U.S. 377 (1922).
158. 589 F.2d at 484 (citing United States v. Lanza, 260 U.S. 377, 382 (1922)). *See also* Fisher, *Double Jeopardy, Two Sovereignties, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Pontikes, *Dual Sovereignty and Double Jeopardy, A Critique of* Bartkus v. Illinois *and* Abbate v. United States, 14 W. RES. L. REV. 700 (1963).

prosecution there should not be subsequent federal prosecution for offenses arising out of the same transaction in the absence of "compelling federal interests."[159] Also, the decision to commence a federal prosecution in such an instance should be made only with the approval of the Attorney General's Office. The court first chastised the U.S. Attorney's Office for not revealing in its brief whether the permission of the Attorney General had been forthcoming, or for that matter even sought. Since the court had no way of determining that issue, it proceeded assuming that permission had not been given.[160] Still, the court held, failure of the prosecutors to abide by the *Petite* policy would not result in the dismissal of the charges against the appellant. Citing several recent Tenth Circuit cases, the court held that:

> [T]he Petite policy does not confer an enforceable right on the defendant in the absence of government request for dismissal. We . . . called attention to the previous line of decision on this subject, noting that in each instance in which Petite was applied it had been invoked at the request of the United States and not over the government's objection. . . . We also pointed out that it was a policy statement of the Department of Justice; that it was based upon the Attorney General's determination that fairness required it; and that it was not a regulation but simply a housekeeping provision. The Attorney General's statement, to be sure, was distributed to the U.S. Attorneys. . . . It followed then that the failure to obtain the Attorney General's approval resulted in there being no enforceable right in the defendant.[161]

Judge Logan concurred, but only because he believed he was bound by case law.[162] He noted that the instant case showed just why the *Petite* policy had become necessary and advocated that the Government should be required to follow the policy, in part, to avoid unfairness to a defendant.[163]

Thus, it appears that appellants will continue to raise *Petite* policy challenges to their convictions despite a solid reluctance on the part of the appellate courts to grant relief on those grounds. But it is also apparent that not all appellate judges feel judicial restraint should rule the day when the Government violates the *Petite* policy.

In *United States v. Bowline*,[164] the defendants were tried on a conspiracy charge.[165] After several days of trial, the trial court dismissed the charge, holding that the evidence indicated there had been more than one conspiracy. But the judge specifically held that retrial of the defendants was not barred by the dismissal. The Tenth Circuit affirmed the lower court's dismissal of the conspiracy charge and then evaluated the case to determine if a

159. 589 F.2d at 484.

160. *Id.* at 485.

161. *Id.* (citing United States v. Valenzuela, 584 F.2d 374, 376 (10th Cir. 1978)). *See also* Petite v. United States, 361 U.S. 529 (1960); United States v. Thompson, 579 F.2d 1184 (10th Cir.), *cert. denied*, 439 U.S. 896 (1978).

162. 589 F.2d at 485 (Logan, J., concurring).

163. *Id.* at 486. *See also* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

164. 593 F.2d 944 (10th Cir. 1979).

165. 21 U.S.C. §§ 841(a)(1), 846 (1976).

subsequent retrial was barred on double jeopardy grounds.[166]

The appellate court held that retrial was not precluded. In doing so, the court relied upon several recent cases which held that when a mistrial is declared at the request of the defendant, retrial is not barred, as contrasted with the situation when the mistrial is granted as the result of the Government's evidence, or due to prosecutorial misconduct or overreaching.[167] In *Bowline*, the Tenth Circuit reasoned the mistrial was declared as a result of the invalidity of the charge and the lower court's decision did not go to the merits of the case. Further, the mistrial was not the result of misconduct or overreaching on the part of the prosecutor.[168]

In a lengthy dissent, Judge Holloway stated his belief that retrial of the defendants was barred by the double jeopardy clause. Relying on the court record, and the fact that the basis for the trial court's declaration of a mistrial was that the evidence indicated there had been more than one conspiracy. Judge Holloway concluded that the declaration of mistrial had gone, at least partially, to the merits of the case. Thus despite the lower court's belief that retrial was available, the judge felt the mistrial was the result of the Government's failure to prove the single conspiracy set out in the indictment.[169]

In a companion case *United States v. Leonard*,[170] the Tenth Circuit addressed the question of whether the mistrial declared by the trial court was due to prosecutorial misconduct. The essential facts were the same as in the *Bowline* case, and the same defendants were involved. In *Leonard*, however, the double jeopardy issue arose out of a somewhat different situation. There, the trial court granted the defendants a mistrial on the basis that the prosecutor had failed to comply fully with both statutory and judicial discovery orders.[171] The trial court, however, noted that it believed the prosecutor had not complied with the discovery orders because he was not " 'informed about the law,' "[172] and not because he acted in bad faith. Therefore, the Tenth Circuit primarily focused its analysis on whether the trial court's finding of lack of bad faith was supported by the trial record. From the record the appellate court concluded that the prosecutor had not intentionally failed to comply with discovery orders in an attempt to provoke a mistrial or to prejudice the defendants.[173] While not actually reaching a determination with respect to whether the trial court's evaluation was correct, the Tenth Circuit held that even if the actions of the prosecutor in this case could be said to have been in bad faith, that fact alone would not support a decision

166. 593 F.2d at 947-48.

167. *Id.* at 948. *See* Lee v. United States, 432 U.S. 23 (1978); United States v. Dinitz, 424 U.S. 600 (1976).

168. 593 F.2d at 948-49.

169. *Id.* at 949-51 (Holloway, J., dissenting).

170. 593 F.2d 951 (10th Cir. 1979).

171. *Id.* at 953. The Government attorney had failed to comply with the Jencks Act, 18 U.S.C. § 3500 (1976). *See generally* Comment, *Expanding Defendant's Discovery: The Jencks Act at Pretrial Hearings*, 24 BUFFALO L. REV. 419 (1975); Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972).

172. 593 F.2d at 953.

173. *Id.* at 954.

that retrial of the defendants was precluded on double jeopardy grounds. Citing *United States v. Dinitz*,[174] the court held that the bad faith must have had the impact of provoking the mistrial request. In the instant case, the court could not find that the decision of the lower court was erroneous.[175]

The defendants in *United States v. Horn*[176] were convicted of submitting false exemption statements to their employers,[177] claiming they had incurred no federal income tax liability for the 1976 taxable year. The defendants, who were husband and wife, were tried jointly but after the jury had deliberated about three and a half hours the jury foreman sent the court a note stating that the jury appeared to be deadlocked.[178]

Upon receiving the note the trial judge recessed the proceedings for the night. The jury resumed its deliberations at about 9 a.m. the following morning after the judge read the jury a formal *Allen* charge.[179] Less than two hours later the jury was brought back into the courtroom and the judge declared a mistrial due to the jury deadlock. The judge did not ask the jury foreman if the panel had made any progress towards reaching a unanimous verdict that morning nor did the judge poll the individual jury members to determine if the jurors felt a consensus might be reached.

On appeal the defendants argued that their retrial on the same charges was barred by the double jeopardy clause of the fifth amendment. The defendants contended that no "manifest necessity" had existed which justified the trial judge *sua sponte* declaring the mistrial.[180]

After reviewing many of the cases which had attempted to interpret the term "manifest necessity,"[181] the Tenth Circuit concluded that, in the case at bar, two factors were controlling: 1) the shortness of the jury deliberations in this case;[182] and 2) the fact that the trial judge, at the time of the declara-

174. 424 U.S. 600 (1976).

175. 593 F.2d at 954-55.

176. 583 F.2d 1124 (10th Cir. 1978).

177. 26 U.S.C. § 7205 (1976).

178. 583 F.2d at 1125.

179. *See* Allen v. United States, 164 U.S. 492, 501 (1896).

180. 583 F.2d at 1126.

181. *See, e.g.*, Arnold v. McCarthy, 566 F.2d 1377, 1387 (9th Cir. 1978) (seven criteria listed: (1) a timely objection by defendant; (2) the jury's collective opinion that it cannot agree; (3) the length of the deliberations of the jury; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communications which the judge has had with the jury; and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict).

The evolution of the proper standard of review of mistrial declarations has gone from the initial recitation of "manifest necessity," United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); through a period of permitting the trial court great discretion, Gori v. United States, 367 U.S. 364 (1961) and Downum v. United States, 372 U.S. 734 (1963); up to a recent attempt to require the trial judge to undertake a search for procedural alternatives to declaring a mistrial, United States v. Jorn, 400 U.S. 470 (1971); and finally back into confusion with a decision seeming to overemphasize the public interest in prosecuting alleged criminals, possibly to the point of derogation of the accused's right to have his trial completed before a particular tribunal, Illinois v. Somerville, 410 U.S. 458 (1973). The Tenth Circuit, however, chose not to deal extensively with *Somerville*, and instead followed a line of cases stressing the trial court's obligation to conduct an affirmative inquiry of the jury as to the state of its deliberations. *E.g.*, United States *ex rel* Russo v. Superior Court, 483 F.2d 7 (3d Cir.), *cert. denied*, 414 U.S. 1023 (1973).

182. 583 F.2d at 1128, 1129. United States *ex rel.* Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975).

tion of a mistrial, had failed to determine that the jury was hopelessly deadlocked.[183] Since neither review of the record nor consideration of the factors listed above lead the Tenth Circuit to believe there had been a showing of a "manifest necessity" mandating the declaration of a mistrial, the Tenth Circuit reversed the lower court's holding that the defendants could be retried and remanded the case for further proceedings.[184]

V. POST-TRIAL PROCEEDINGS

A. *Prisoner's Rights*

In *Twyman v. Crisp*,[185] the Tenth Circuit considered three substantive claims of an Oklahoma prisoner before affirming the decision of the trial court denying the prisoner relief. Prisoner Twyman had alleged that he was denied: adequate medical care; due process because of his reclassification from medium to maximum security without an adequate reclassification hearing; adequate access to prison law library facilities through hour restrictions; and access to the court by virtue of the prison's postage stamp policy.

At the outset the Tenth Circuit acknowledged that a prisoner's claim of denial of adequate medical treatment is a valid claim to raise in federal court. The appellant's contention was that he had ulcers but that prison officials had taken him off of his "bland diet" thereby subjecting him to cruel and unusual punishment.[186] The court noted that in order to state a cause of action upon which relief may be granted "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[187] After turning to the record in the case, which indicated that any change in the appellant's diet was the result of administrative oversight or misunderstanding, the Tenth Circuit concluded that there was no evidence of deliberate defiance of a medical order prescribing a special diet for the appellant.[188] Furthermore, the court noted that the appellant had not carried his burden of proof, not only in respect to the deliberate conduct requirement but also on the issue of the seriousness of the appellant's medical need for the special diet.[189]

The court also decided the reclassification issue in favor of the Oklahoma prison officials. Pointing to the fact that under Oklahoma law the Director of Corrections has "total discretion" in the area of prisoner transfers, the Tenth Circuit held that the appellant had "no legitimate claim of entitlement to remain in the general prison population" and that the decision to transfer the appellant to the maximum security section was "completely within the sphere of authority of prison officials."[190]

With respect to access to the prison law library, the Tenth Circuit stated

183. 583 F.2d at 1127, 1129.
184. *Id.* at 1129.
185. 584 F.2d 352 (10th Cir. 1978).
186. *Id.* at 354. *See also* Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970).
187. 584 F.2d at 355 (citing West v. Keve, 571 F.2d 158 (3d Cir. 1978)).
188. 584 F.2d at 355.
189. *Id. See* Dickson v. Colman, 569 F.2d 1310 (5th Cir. 1978); Estelle v. Gamble, 429 U.S. 97 (1976); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).
190. 584 F.2d at 355-57.

that the appellant had not been able to show that he was prejudiced by restricted access. The only evidence of prejudice presented by the appellant in this regard was that because of the restrictions he had been forced to seek continuances in certain cases. While this allegation might be true, the court stated, it did not rise to the level of prejudice which would entitle Twyman to relief. Indeed, the court noted that many practicing attorneys for a variety of reasons also are forced to seek court continuances.[191]

With respect to the prison's stamp policy, the appellant relied upon the recent Supreme Court decision in *Bounds v. Smith*[192] which stated, in part: "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them."[193]

The Tenth Circuit noted that a literal reading of *Bounds* would tend to support the appellant's claim. However, observing that the Oklahoma prison in question made adequate provision of stamps for indigent prisoners and that the appellant had been unable to show he had been substantially prejudiced by the stamp policy, the court held that prisoners do not have an unlimited right to free postage with respect to stamps for mail to be sent to courts. As for the interpretation of the language in *Bounds*, the Tenth Circuit found it best to leave that function to the Supreme Court.[194]

Possible remedies for the overcrowding in Oklahoma prisons were examined in *Battle v. Anderson*.[195] This case grew out of a series of long-term problems in the Oklahoma prison system. The trial court failed to grant the state a continuance to permit preparation for a compliance hearing on the overcrowding issue. After an extensive review of the lower court record, and after remarking that it appeared the Oklahoma prison officials were complying with the trial court's initial order regarding overcrowding in good faith and as rapidly as possible, the Tenth Circuit remanded the case to the lower court.[196] The appellate court concluded that it could not reach the merits of the case since it was possible the trial court had not provided an adequate opportunity for the prison officials to prepare for the hearing which was the subject of the appeal.

B. *Sentencing*

In *United States v. Davidson*,[197] the appellant, a prisoner at a federal prison in Oklahoma, was convicted of assaulting a fellow inmate with the intent to commit murder and of conveying a knife from place to place within the prison.[198] The trial judge sentenced him to ten years imprisonment on the assault charge and a five year term on the conveying a knife count, the

191. *Id.* at 357. *See also* United States v. Evans, 542 F.2d 805 (10th Cir. 1976).
192. 430 U.S. 817 (1977).
193. *Id.* at 824-25.
194. 584 F.2d at 359. *See* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). *Contra* Craig v. Hocker, 405 F. Supp. 656 (D. Nev. 1975).
195. 594 F.2d 786 (10th Cir. 1979).
196. *Id.* at 792.
197. 597 F.2d 230 (10th Cir. 1979).
198. 18 U.S.C. §§ 113(a), 1792 (1976).

two sentences to be served concurrently. The court did not, however, specify whether these sentences were to run concurrently or consecutively with the bank robbery sentence which the appellant was then serving. The sentencing took place shortly before noon and the appellant was in the process of being returned to the prison to serve the terms when the court ordered him to appear before it to correct the oversight of the trial judge. The vehicle in which the appellant was travelling was turned around and about one and one-half hours after the initial sentencing the appellant was brought before the court where the assault and conveying sentences were pronounced to run consecutively with his bank robbery sentence.[199]

On appeal, the appellant challenged the sentencing procedure, alleging he had been subjected to double jeopardy. The Tenth Circuit, however, disagreed and affirmed the sentencing of the trial court. The court drew a distinction between judicial and executive custody, with the sentence not commencing to run, and therefore jeopardy not attaching, until a convicted person is received by the institution at which his sentence is to run.[200]

United States v. Ahgoom[201] presented an issue concerning sentencing under the Federal Youth Corrections Act (FYCA). In *Ahgoom* the trial court sentenced the youthful appellant to an eight year prison term for his conviction on an unlawful possession of firearms charge.[202] Thus, the appellant was not given the benefit of the more lenient FYCA statute. The appellant thereafter filed for relief under 28 U.S.C. § 2255.

The Tenth Circuit stated that the trial court had apparently ignored *Dorszynski v. United States*[203] which had been handed down by the Supreme Court several months prior to the sentencing of Ahgoom. *Dorszynski* held that before a trial court could sentence a youth offender under the more punitive adult sentencing provisions, the court must expressly find on the basis of the court record that sentencing under the FYCA would not benefit the defendant.[204] In the instant case, however, the only trial court finding had been that the appellant's case minimally required an eight year sentence.[205] The Government argued that this finding showed the trial judge had made an implicit finding that no benefit would be derived from sentencing the appellant under the FYCA. But the Tenth Circuit distinguished several cases cited by the Government to that effect on the basis that they were pre-*Dorsynski* decisions.[206] Therefore, the court remanded the case to the trial court for resentencing and the lower court's express findings as to the possible benefits of sentencing the appellant under the FYCA.

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199. 597 F.2d at 231, 232-33.

200. *Id.* at 233. *See* Vincent v. United States, 337 F.2d 891 (8th Cir. 1964); Walton v. United States, 202 F.2d 18 (D.C. Cir. 1953); Borum v. United States, 409 F.2d 433 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 916 (1969). *See also* Pugh and Carver, *Due Process and Sentencing; From* Mapp *to* Mempa *to* McGautha, 49 TEX. L. REV. 25 (1970).

201. 596 F.2d 433 (10th Cir. 1979).

202. 26 U.S.C. § 5861(d) (1976).

203. 418 U.S. 424 (1974).

204. *Id.* at 444.

205. 596 F.2d at 434.

206. *Id.* at 434. *See* McKnabb v. United States, 551 F.2d 101 (6th Cir. 1977); Coleman v. United States, 532 F.2d 1062 (6th Cir.), *cert. denied*, 429 U.S. 847 (1976).

C. *Post-Trial Procedure*

In *United States v. Lucas*,[207] the Tenth Circuit dealt with the question of whether an untimely *pro se* notice of appeal filed with the trial court conveyed jurisdiction to the appellate court to hear the appeal. The facts of the case indicated that the appellant filed his *pro se* notice of appeal with the district court twenty days after the date of judgement finding him guilty of bank robbery. Thus, his filing was ten days overdue but still within the thirty day extention period under rule 4(b).[208] The Tenth Circuit, noting that a determination was needed by the lower court of whether the late filing of the notice was due to excusable neglect, remanded the case to the district court where the appellant could file a motion for an extension of time to file his notice of appeal.[209]

D. *Post-Conviction Relief*

The issue in *United States v. Talk*[210] was whether successive motions by a prisoner made pursuant to 18 U.S.C. § 2255 were barred by Supreme Court Rule 9(b) when there had been an intervening parole hearing for the appellant.[211] Talk was convicted of rape on an Indian reservation[212] and, at his first section 2255 hearing he alleged that the trial court which had sentenced him had wanted him to be eligible for parole prior to serving a third of his sentence. The hearing court denied his motion. After that, the appellant received another parole hearing but was again denied parole prior to serving a third of his sentence. The appellant then filed another section 2255 motion, again alleging that he should be paroled prior to serving a third of his sentence. The hearing court dismissed the appellant's motion as successive. The Tenth Circuit, in affirming the lower court's decision, held that rule 9(b) was broad enough to bar the second motion as successive since his prior motion had been determined on the merits and thus the motion in the case at bar had previously been litigated and determined adversely to the appellant.[213]

VI. TRIAL MATTERS

A. *Affirmative Defenses*

In *United States v. Barron*,[214] the Tenth Circuit dealt with the affirmative defense of entrapment. The facts indicated that one of the defendants, Barron, was involved in the sale of drugs to federal undercover agents. He was tried and convicted of possession with the intent to distribute

207. 597 F.2d 243 (10th Cir. 1979).
208. FED. R. APP. P. 4(b).
209. 597 F.2d at 245-46.
210. 597 F.2d 249 (10th Cir. 1979).
211. *Id.* at 249-50.
212. 18 U.S.C. § 1153 (1976). The appellant was sentenced pursuant to 18 U.S.C. § 4208(a)(2) (1976).
213. 597 F.2d at 250-51.
214. 594 F.2d 1345 (10th Cir. 1979).

methamphetamine.[215] On appeal, he alleged that his conviction should be reversed because he was entrapped into committing the crime by the government agents. The Tenth Circuit began its analysis by inquiring into the assertion that the defense of entrapment had been established by Barron as a matter of law. Citing *United States v. Gurule*,[216] the court set out the rule of law as "whether there is undisputed evidence which shows conclusively and unmistakably that an innocent person was induced to commit the act complained of by trickery or fraud of a government agent."[217] Further, the court stated that in order for the appellant to establish entrapment it must appear that he was "an innocent dupe" and that the agents were the prime movers in causing him to commit the crime in question.[218]

The Tenth Circuit held, however, that the evidence presented at trial indicated that Barron was involved in the planning and preparation of at least one of the drug transactions with which the appellants were charged. Thus, the court held that the evidence had failed to establish, and, in fact, was totally inconsistent with Barron's allegation of entrapment.[219] The court also noted that the conduct of the government agents in the present case could not be said to have been "generally outrageous." It did hold, however, that the appellant could, and did, have the entrapment issue submitted to the jury.[220]

In *United States v. Szycher*,[221] the appellant was charged with possession with the intent to distribute cocaine.[222] The appellant's entrapment claim arose out of the allegations that while dealing with federal undercover drug agents he became frightened and was afraid not to comply with their requests that he furnish them drugs. Also, the appellant claimed he had been induced to enter into the drug deals with the agents as the result of the activities of an informer whom the Government had recruited while the informer was in government custody on drug related charges.

At the conclusion of the evidence at trial, the appellant made an oral motion to dismiss the charges, later supplemented by a written motion, asserting that the actions of the informer were so outrageous and illegal as to rise to the level of a denial of due process. The trial court denied the appel-

215. 21 U.S.C. § 841 (1976).

216. 522 F.2d 20, 23 (10th Cir. 1975). *See also* United States v. Rosenfeld, 545 F.2d 98 (10th Cir. 1976). For general discussion of the doctrine of entrapment *see* Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L.J. 573 (1976); Note, *Criminal Procedure—The Entrapment Defense—Determination of Predisposition*, 11 LAND & WATER L. REV. 265 (1976) (citing Wyoming cases), and Note, *The Entrapment Defense—What Hath the Model Penal Code Wrought?*, 16 DUQ. L. REV. 157 (1977-78).

217. 594 F.2d at 1349.

218. *Id.*

219. *Id.* at 1349-50. *See also* United States v. Russell, 411 U.S. 423 (1973); United States v. Williams, 488 F.2d 788 (10th Cir. 1973).

220. 594 F.2d at 1349-50. *See* United States v. Quinn, 543 F.2d 640 (8th Cir. 1976).

221. 585 F.2d 443 (10th Cir. 1978).

222. In addition to the defense of entrapment, the appellant challenged his conviction on the ground that there was no rational basis for the classification of cocaine as a Schedule II controlled substance. The court rejected this argument, commenting that it had been raised and found to be without merit on many previous occasions. *Id.* at 444-45. *See also* United States v. Maryland Savings Share Ins. Corp., 400 U.S. 4 (1970); United States v. Marshall, 532 F.2d 1279 (1976).

lant's motion, and while noting that the informer had, as alleged by the appellant, apparently used cocaine in the presence of the appellant and the government agents, that this activity did not rise to the level of entrapment.[223] The trial judge further stated that there was sufficient evidence presented by the Government to sustain its burden of showing the appellant's predisposition to commit the crime charged and that the issue of entrapment had been properly submitted to the jury.[224]

The Tenth Circuit, noting that government agents can "employ appropriate artifice and deception to ferret out illegal activities," held that the decision of the trial court with respect to the appellant's motion was not clearly erroneous and it therefore affirmed the decision of the lower court.[225]

The appellant also challenged the trial court's jury instruction on the entrapment issue. The appellant contended that the Government was required to show, not only a predisposition on the part of the appellant to commit the crime charged, but also, that in the absence of any government involvement that the appellant would still have been likely to commit the crime. Therefore, the appellant asserted that the trial court had erred in not so instructing the jury. The Tenth Circuit rejected this broad interpretation of entrapment and declined to adopt such a definition of the defense.[226]

B. *Trial Court Discretion*

The practices of Government witnesses were examined by the Tenth Circuit in *United States v. Priest*.[227] In that case the appellant was charged with illegal making, possession, and transfer of a sawed-off shotgun.[228] He was tried by a jury and convicted of all three counts. The Government's undercover agents, who purchased and witnessed the purchase of the firearm from the appellant, testified at trial that shortly after the sale they had made a written record of "their recollection of [the] events."[229] The writings were transcribed into typed reports and the handwritten reports and notes were thereafter destroyed. The record revealed that at least one of the witnesses compared the notes and the typed reports and testified that the reports accurately reflected the material contained in the notes.[230]

The defense attorney was allowed to examine the typed reports, but at trial, he objected to the fact the original notes had been destroyed. Based upon this complaint, the defense counsel moved to strike the testimony of the witnesses whose notes had been destroyed. The trial court advised the Government that it disapproved of the practice of destroying the notes, but exercising its discretion, refused to strike the testimony of the Government

223. 585 F.2d at 447-48.
224. *Id.* at 447-49.
225. *Id.* at 449.
226. *Id.* at 449-50. *See* Sorrells v. United States, 287 U.S. 435 (1932). *Accord* Sherman v. United States, 356 U.S. 369 (1958).
227. 594 F.2d 1383 (10th Cir. 1979).
228. These offenses violated 26 U.S.C. §§ 5861(f,d,e) (1976) respectively.
229. 594 F.2d at 1384.
230. *Id.* at 1385.

witnesses.[231] The Tenth Circuit held that the trial court had acted correctly, since there was no indication that the witnesses, in destroying the notes, had acted in bad faith nor that the appellant's defense had been prejudiced by this practice.[232]

Another assignment of error by the appellant in *Priest* dealt with the refusal of the appellant's offer of proof that a potential defense witness, if called, would testify that the appellant had acted as an informant for a state law enforcement agency and had provided it with valuable information concerning a number of crimes. The trial court rejected the offer as irrelevant and immaterial to the case at bar. On appeal, the Tenth Circuit found that the admissibility of this sort of evidence was peculiarly within the realm of discretion reserved for the trial court and, finding no abuse of discretion, the appellate court affirmed Priest's convictions.[233]

One of the issues in *United States v. Watson*[234] was whether the trial court had abused its discretion in admitting into evidence tape recordings of certain telephone conversations incriminating the appellants. At trial, the appellants' attorneys objected to the use of the tapes on the ground that they were unintelligible and inaudible. The Tenth Circuit first noted that unless the tapes were so unintelligible as to render the recording as a whole untrustworthy, then the admission of the tapes was a matter "within the sound discretion of the trial judge."[235] In concluding that the trial judge had not erred in admitting the tapes into evidence, the appellate court stated it had listened to the tapes and found that they were not so unintelligible that they could be said to be untrustworthy.[236]

Next, the appellants contended the trial court had erred in providing the jury with transcripts of the tapes to aid the jury in understanding the substance of the conversation. Evidence was offered as to the accuracy of the transcripts. Furthermore, the trial judge had instructed the jury that the transcripts were to be used only to aid it in understanding the tapes and were not to be considered as evidence. This limiting instruction was repeated by the court on several occasions during the appellant's trial.[237] Also, the Tenth Circuit noted that the transcripts had not, in fact, been introduced into evidence. Therefore, the use of the transcripts was held to be within the proper bounds of the trial court's discretion.[238]

In *United States v. Bowers*,[239] the Tenth Circuit faced a situation where the Government had not adquately complied with discovery and, thus, had

231. *Id.*

232. *Id. See also* United States v. Stulga, 584 F.2d 142 (6th Cir. 1978); United States v. Martin, 565 F.2d 362 (5th Cir. 1978); United States v. Dupree, 553 F.2d 1189 (8th Cir. 1977).

233. 594 F.2d at 1385. *Accord* United States v. Nolan, 551 F.2d 266 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977).

234. 594 F.2d 1330 (10th Cir. 1979).

235. *Id.* at 1335. *See also* United States v. Brinklow, 560 F.2d 1008 (10th Cir. 1978); United States v. Jones, 540 F.2d 465 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977).

236. 594 F.2d at 1336.

237. *Id.*

238. *Id. See also* United States v. John, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975).

239. 593 F.2d 376 (10th Cir. 1979).

violated a Federal Rule of Criminal Procedure.[240] The Government, rather than providing the defendant with the discoverable material replied merely that the material would be made available to the appellant prior to trial. At trial, the judge allowed the admission into evidence of the materials in question even though the Government had not discharged its affirmative duty to advise the appellant of its possession of the material.[241]

The Tenth Circuit, after noting the Government's response had failed to comply with discovery requirements, held that the trial court had not abused its discretion in allowing the items to be admitted into evidence. Since the appellant had been unable to demonstrate that the admission of items resulted in "substantial prejudice" to him, his conviction was affirmed.[242]

C. *Evidence of Prior Convictions*

In *United States v. Gilliland*,[243] the Tenth Circuit dealt with the propriety of certain questions asked by the Government of a defense witness concerning criminal convictions of the appellant some 14 to 34 years prior to the offense for which the appellant was on trial. The appellant was convicted of transporting a stolen automobile across state lines in violation of the Dyer Act.[244] At trial, the defense called the appellant's stepson as a witness to the alleged purchase of the vehicle in question by the appellant.

On cross-examination the Government asked the stepson questions concerning the appellant's character. The witness testified that appellant's character was good. The Government then asked the witness if he were aware that the appellant had twice been convicted of Dyer Act violations and twice of forgery, all of the convictions being over ten years old. Later in the trial, the appellant and the appellant's wife took the witness stand and these prior convictions were again raised in questioning. On appeal before the Tenth Circuit, the Government argued that the questions asked of the stepson were justified because that witness was attempting to testify for the appellant as a character witness.[245]

The Tenth Circuit, quoting rule 404(b), laid out the general rule that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."[246] If the defendant, however, makes good character an issue then the Government is permitted to use evidence of the defendant's prior convictions to rebut the character evidence, the court stated. But in the case at bar, the Tenth Circuit held, these were not the facts. Rather, the Government had attempted to turn the stepson, initially an eyewitness to the alleged purchase

240. *See* FED. R. CRIM. P. 16.

241. 593 F.2d at 379. *See also* Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse*, 45 MISS. L.J. 887 (1974) (citing Mississippi cases); Note, *Criminal Procedure—Discovery—Movement Toward Full Disclosure*, 77 W. VIR. L. REV. 561 (1974-75) (citing West Virginia cases).

242. 593 F.2d at 379. *See also* United States v. Hodges, 480 F.2d 229 (10th Cir. 1973).

243. 586 F.2d 1384 (10th Cir. 1978).

244. 18 U.S.C. § 2312 (1976).

245. 586 F.2d at 1386-88.

246. *Id.* at 1388 (quoting FED. R. EVID. 404(b)).

of the car by the appellant, into a character witness for the appellant by asking the witness questions about the appellant's good character.[247] Thus, contrary to *Michelson v. United States*,[248] the Government had introduced evidence concerning the appellant's prior convictions without the accused having put his character at issue. Therefore, the Government improperly brought out evidence of the appellant's prior convictions.[249]

The Tenth Circuit relied on *United States v. Burkhart*,[250] a Dyer Act case where the Government brought out evidence of the defendant's prior Dyer Act convictions some 4 and 15 years prior to the charges for which he was on trial. The *Burkhart* court held:

> First, the accused is required to defend charges which are not described in the information or indictment. As a result he is required to defend past actions which he may have in the past answered and with respect to which he may have even served his sentence. Thus, he is in effect tried as a recidivist though such a charge is not a part of the federal criminal code.[251]

Since in the instant case the prior convictions were even older than those rejected in *Burkhart*, they were even less relevant, the Tenth Circuit held.[252] Moreover, the appellate court held that any defect in the Government's actions had not been subsequently waived by the appellant when he took the witness stand to testify in his own behalf. Because the convictions were over ten years old they could not be used to impeach the appellant unless the trial court determined that the prior convictions were of especially high probative value outweighing any possible prejudicial effect and unless the appellant had been given prior written notice of the Government's intent to use such evidence. After examining the record, the Tenth Circuit found neither of the tests had been met. Therefore the appellate court reversed the appellant's conviction and remanded the case for a new trial.[253]

D. *Sufficiency of the Evidence*

In *United States v. Smurthwaite*,[254] a physician practicing as a weight control specialist was convicted of eleven counts of illegally dispensing and distributing controlled substances.[255] The appellant challenged the sufficiency of the evidence and specifically the fact that, at the close of the Government's case-in-chief, there had been no evidence concerning the usual course of practice of a doctor in his field. At the close of the Government's case, the appellant made a motion for judgement of acquittal on the above ground but the trial court deferred ruling on the motion. Afterward the Government produced, as a rebuttal witness, a doctor who did testify as to the usual course of practice for a naturopathic physician.

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247. 586 F.2d at 1388-89.
248. 335 U.S. 469 (1948).
249. 586 F.2d at 1389.
250. 458 F.2d 201 (10th Cir. 1972).
251. *Id.* at 204.
252. 586 F.2d at 1390.
253. *Id.* at 1390-91.
254. 590 F.2d 889 (10th Cir. 1979).
255. 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2 (1976).

The Tenth Circuit noted that the standard for reviewing whether to grant the appellant's motion for acquittal was to consider the evidence in the light most favorable to the Government.[256] This, coupled with the fact that the appellate court found that the trial court had not abused its discretion in allowing the Government to produce rebuttal evidence which should have been introduced in the Government's case-in-chief, was sufficient to sustain the appellant's conviction. The evidence showed appellant had prescribed diet pills to persons who were not overweight, that he had indicated he knew his patients were not using the drugs for weight control but rather for parties, and that most of the time he saw his patients only for a short time and did not usually give them a physical examination before prescribing the drugs.[257] Therefore, the Tenth Circuit held that even if the Government had wholly failed to produce any medical evidence on the course of medical practice in the appellant's area, the decision of the lower court would still be affirmed. This was because, as the court stated quoting *United States v. Bartee*:[258] "[T]he jury is not bound by such expert testimony and may, of course, consider all of the facts and circumstances surrounding the prescribing as related by lay witnesses."[259]

E. *Rule 10(c)*

In *United States v. Smaldone*,[260] the appellants urged the Tenth Circuit to set aside their convictions on the basis that the court reporter had lost her notes and, therefore, had been unable to transcribe the testimony of two of the appellants. After it became apparent that the court reporter could not locate the notes, the trial court invoked rule 10(c) of the Federal Rules of Appellate Procedure.[261] Pursuant thereto the appellants prepared a statement of the lost evidence and a hearing was held at which the Government made objections and amendments to the statement. The trial court then approved the narrative as a substitute for the testimony of the two appellants, and it was made part of the court record for appellate review.

The Tenth Circuit, noting that the gist of appellant's argument was that reversible error was committed merely because of the lost notes, held that rule 10(c) had been adopted for just such a situation. The entire purpose of the rule was to provide a method for reconstructing a missing record when an actual transcript could not for some reason be obtained.[262] Therefore, the conviction was affirmed since the statement provided a report equivalent to that which would have been available had the preparation of a transcript been possible.

256. 590 F.2d at 891. *See also* Speers v. United States, 387 F.2d 698 (10th Cir. 1967), *cert. denied*, 391 U.S. 956 (1968).
257. 590 F.2d at 890-91.
258. 479 F.2d 484 (10th Cir. 1973).
259. 590 F.2d at 892 (quoting *Bartee*, 479 F.2d at 488).
260. 583 F.2d 1129 (10th Cir. 1978).
261. FED. R. APP. P. 10(c).
262. 583 F.2d at 1134. *See also* Draper v. Washington, 372 U.S. 487 (1963); Morgan v. Massey, 526 F.2d 347 (5th Cir. 1976).

F. *Exceptions to the Hearsay Rule*

In *United States v. Andrews*,[263] the Tenth Circuit addressed the applicability of the co-conspirator exception to the hearsay rule. The charges against the appellant had arisen out of a conspiracy to distribute cocaine. The court stated that the rule with respect to the exception is that testimony which is otherwise hearsay will be admitted only after the existence of a conspiracy is established by independent evidence.[264] Noting that the essential element of conspiracy is agreement to violate the law and that once a conspiracy is established only slight evidence is required to implicate a co-conspirator, the Tenth Circuit rejected the appellant's claim that the independent evidence of conspiracy was inadequate.[265]

After reviewing the evidence the court held that the evidence of the conspiracy was sufficient to allow the introduction of hearsay statements made in furtherance of the conspiracy, even though the other evidence against the appellant was not strong.[266]

G. *Privileges*

Interspousal privilege was the issue in *United States v. Trammel*.[267] In *Trammel*, the wife of one defendant was allowed to testify against all of the defendants at their joint trial on charges of importation of heroin and of a related conspiracy count.[268] Trammel objected at trial to his wife's testimony, basing his objection on a claim of interspousal privilege. Mrs. Trammel was named in the indictment against the defendants as an unindicted co-conspirator and she was given immunity from prosecution in exchange for her testimony. This testimony dealt with the acts of her husband rather than their private communications.

With great difficulty, the Tenth Circuit held that the interspousal privilege was inapplicable on these particular facts and affirmed Trammel's conviction. The court began its analysis by distinguishing *Hawkins v. United States*[269] since in that case the witness-spouse was not subject to prosecution for the same crime as that with which her husband was charged. But, in the instant case, the court relied heavily on the fact that Mrs. Trammel was liable for prosecution, prior to the grant of her immunity, for the crimes about which she testified.[270] Thus, the court reasoned, to hold that she

263. 585 F.2d 961 (10th Cir. 1978).

264. *Id.* at 964. *See* Lowther v. United States, 455 F.2d 657 (10th Cir.), *cert. denied*, 409 U.S. 857 (1972).

265. *See* FED. R. EVID. 104(a), (b) and 801(d)(2)(E). *See also* United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977). *Cf.* United States v. Krohn, 573 F.2d 1382 (10th Cir. 1978), *cert. denied*, 98 S. Ct. 2857 (1979).

266. 585 F.2d at 965-66.

267. 583 F.2d 1166 (10th Cir. 1978), *cert. granted*, 440 U.S. 934 (1979).

268. 21 U.S.C. §§ 962(a), 963 (1976).

269. 358 U.S. 74 (1958). In *Hawkins* the Supreme Court recognized that the common law husband-wife privilege was applicable in federal cases.

270. 583 F.2d at 1168-69. The confidential marital communication privilege bars introduction into evidence of confidential communications between spouses, United States v. Apodaca, 522 F.2d 568, 570 (10th Cir. 1975). *See also* Note, *Immunity from Prosecution and the Fifth Amendment: An Analysis of Constitutional Standards*, 25 VAND. L. REV. 1207 (1972).

could not testify would have resulted in the loss of her immunity and, therefore, the policy reason for the privilege of fostering domestic tranquility would not, in this instance, be served by allowing the appellant to prevent his wife from testifying.[271] Citing the Federal Rules of Evidence, the court held that the existence of a privilege must be determined " 'in the light of reason and experience.' "[272] Here, the court pointed out Mrs. Trammel's avoidance of prosecution, which was based on her promise to testify against the defendants, and her use by the other defendants as a pawn in the crime as reasons for ruling the privilege inapplicable in this case.[273] Furthermore, the court stated that the Trammels were not a "family" in the usual sense of the word, but rather, that their marriage had been a vehicle for criminal acts which were "despicable and completely alien to anything conducive to the preservation of a family relationship built around the legal status of marriage."[274] Therefore, the court held, Trammel represented a situation in which the interest of the public in bringing the defendants to justice outweighed any possible benefit to be gained by upholding the appellant's claim of privilege.[275]

Judge McKay dissented, stating that while the majority had noted the general rule, they had adopted the exception.[276] Further, he predicted that the decision of the majority would lead to undesirable consequences; specifically, in situations where spouses were accused of conspiracy regarding tax matters. The dissenting judge also warned that the ruling would give government prosecutors almost unlimited discretion to "determine which shall be worth saving and which shall not have the benefit of the common law privilege."[277] This would be the result because the prosecutor could determine to whom and when grants of governmental immunity would be given. Judge McKay also criticized the majority since, in his opinion, the decision would do violence to the family:

> And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime. While the Trammel home is perhaps far from an ideal one, the principle established in his case applies to all accused couples and makes us unwitting partisans in the continuing assaults on the stability of the home—the root of true stability in any society.[278]

CONCLUSION

The Tenth Circuit's criminal law and criminal procedure decisions dur-

271. 583 F.2d at 1169-70. *See* United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974).

272. 583 F.2d at 1170 (citing FED. R. EVID. 501). *See also* Baker v. United States, 329 F.2d 786 (10th Cir.), *cert. denied*, 379 U.S. 853 (1964).

273. 583 F.2d at 1170. The court characterized Mrs. Trammel as a "conduit" who was merely "used" by the conspiracy. *Id.*

274. *Id.*

275. *Id.* at 1170-71.

276. *Id.* at 1171-72 (McKay, J., dissenting).

277. *Id.* at 1173.

278. *Id.*

ing the survey period were, almost without exception, merely the application of existing precedent to varying fact situations. Of the cases reviewed in this survey *United States v. Erb*[279] is certainly interesting due to its extreme fact pattern but it is questionable if the decision breaks new ground in the area of warrantless searches. *United States v. Trammel*,[280] however, presents a different situation. If affirmed by the Supreme Court, that decision would create a significant new exception to the existing evidentiary marital privilege, applicable in all of the circuits and, perhaps, could be adopted by at least some states.*

David M. Conner

* The Tenth Circuit's decision in *Trammel* was unanimously affirmed by the Supreme Court on February 27, 1980.

279. See notes 42-54 and accompanying text *supra*.
280. See notes 267-278 and accompanying text *supra*.